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No. 02-639

IN THE

Supreme Court of the United States

PATRICIA C. ANDERSON, MICHAEL A. HOSEIN, AND STEPHEN E. PARKER

Petitioners,

v.

ALEXANDER F. TREADWELL, AS SECRETARY OF STATE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY IN SUPPORT OF PETITION

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REPLY IN SUPPORT OF PETITION

New York Real Property Law 442-h(3) is unconstitutional: It is a content-based restriction on truthful, non-deceptive commercial speech that is not intended to prevent commercial harms. Moreover, the law is underinclusive because it purports to serve a general government interest in privacy, but prohibits only speech of disapproved content by specified speakers (real estate licensees). Because § 442-h(3) regulates commercial speech, the Second Circuit held that strict scrutiny did not apply. The court also held that there is a "'reasonable fit,'" between the law at issue and its purpose, *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 565 (1980). These holdings on important, recurring legal questions conflict with decisions of this Court and of the Seventh Circuit. Each question presented is worthy of this Court's review.

Moreover, on January 10, 2003, this Court granted the petition for certiorari in *Nike, Inc.* v. *Kasky*, 71 U.S.L.W. 3319 (U.S. Jan. 10, 2003) (No. 02-575). The questions presented in that case implicate the proper scope of the commercial speech doctrine and the appropriate legal framework for analysis of commercial speech. This Court's analysis in that case may have implications here. Accordingly, the Court may wish to hold this petition pending its decision in *Nike*.

Respondents' opposition brief offers three reasons why the petition is not worthy of this Court's review. Respondents' arguments rest on mischaracterizations of the decision below and of decisions of this Court and the Seventh Circuit. When the mischaracterizations are exposed, the necessity for this Court's intervention is clear.

A. The Court Should Grant The Petition To Address When Strict Scrutiny Applies To Commercial Speech.

In arguing that the Court should not address whether strict scrutiny applies to commercial speech restrictions such as §443-h(3), respondents simply fail to address *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 501 (1996), and *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 382 (1992), decisions that appear to hold that strict scrutiny would apply. See Pet. at 12-14. The arguments that respondents do make, moreover, are wrong.

First, respondents contend that a majority of current Justices have not concluded that the *Central Hudson* test is inappropriate for restrictions on truthful, non-misleading commercial speech. Opp. at 12 (quoting *Thompson* v. *Western States Med. Ctr.*, 122 S. Ct. 1497, 1504 (2002)). The *Thompson* Court's statement – that "*Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision," *id.* at 12 n.4 (quotation omitted), – means that the law at issue did not survive even *Central Hudson* scrutiny and the Court was not required to decide whether strict scrutiny applied. Indeed, *Thompson* expressly acknowledges that "[m]embers of the Court have expressed doubt about the *Central Hudson* analysis." *Thompson* v. *Western States Med. Ctr.*, 122 S. Ct. 1497, 1504 (2002) The Petition demonstrates that at least five Justices have indicated that strict scrutiny properly applies to laws such as § 442-h(3). Pet. at 11-15.

Second, respondents assert that even assuming strict scrutiny applies to some commercial speech, it does not apply to restrictions on solicitation by professionals. Opp. at 13-14 (citing *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618 (1995); *Edenfield v. Fane*, 507 U.S. 761 (1993)). This contention is demonstrably wrong. These cases preceded the Court's recent, frequent expressions of concern about *Central Hudson*. Moreover, the restrictions at issue were intended

primarily to advance state interests related to the regulation of certain professions and the maintenance of public confidence in those professions' performance of important public functions. To the extent the regulations addressed privacy interests, they primarily reflected concerns about the unprofessional nature of the privacy invasion and its harm to other interests served by professional regulation. See *Florida Bar*, 515 U.S. at 624 (upholding 30-day restriction on direct mail solicitation of accident victims to protect privacy and maintain the legal profession's reputation). In fact, in *Edenfield*, the Court *vacated* the state's restriction on CPAs' in-person solicitations, despite the state's contention that its purpose was to protect consumers from fraud and preserve CPA independence. See 507 U.S. at 768. The state interests in *Florida Bar* and *Edenfield* thus were qualitatively different from New York's asserted interest here.[1] Finally, any tension between these decisions and others of this Court simply highlights the necessity of this Court's intervention to clarify the appropriate standard to use in assessing the constitutionality of laws restricting commercial versus professional solicitation.

Third, respondents contend that the "factors that have led some members of this Court to question the applicability of strict scrutiny" to commercial speech are not present here. Opp. at 14. This assertion is no more than wishful thinking. The factors that have created concern *are* present – to wit, a restriction of truthful, non-misleading speech for reasons unrelated to commercial harm (such as fraud and protection of a fair bargaining process), exacerbated by the fact that the restriction is content-based and underinclusive. See *R.A.V.*, 505 U.S. at 396 ("the only interest distinctively served by the

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[1] For example, the flyer for which petitioners were prosecuted stated: "If you have considered selling or buying a home now or in the future, or simply want to find out what your home is worth in today's market, don't hesitate to call." J.A. 30.

content limitation is that of displaying the [state's] hostility towards the particular biases thus singled out").

The absence of certain other "factors" is thus irrelevant. Respondents assert, and petitioners freely acknowledge, that a resident-activated mechanism such as § 442-h(3) is not "motivated by paternalism." Opp. at 14. The absence of this "factor" creating concern, however, does not excuse or justify the presence of state-sponsored discrimination that is both underinclusive and based on disfavored content and the identity of the speaker – indicia that strongly suggest the State's hostility to the message and the messenger.

Similarly, petitioners acknowledge that the State did not bar real estate licensees from *all* channels of advertising in cease-and-desist zones, but respondents fail to recognize that the issue is whether there are adequate alternative channels of communication and that there is no cost-effective alternative to obtain listings. J.A. 57, 60. This Court, moreover, has rejected the argument that alternative means of communication saved the restrictions on commercial speech at issue in *Bolger* v. *Youngs Drug Products*, 463 U.S. 60 (1983), and *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410 (1993). In so doing, the Court explained that although "the burden on commercial speech was imposed by denying the speaker access to one method of distribution . . . without interfering with alternative means of access to the audience. . . . [T]hat fact did not minimize the significance of the burden . . . ." *Discovery Network*, 507 U.S. at 427.[2] In addition, suitable alternative means of communication are not available to petitioners, who are barred from effective methods of generating real estate business, such as direct

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[2] *See Discovery Network*, 507 U.S. at 427 ("'[T]he Postal Service argues that Youngs can communicate with the public otherwise than through the mail. [This argument falls] wide of the mark. A prohibition on the use of the mails is a significant restriction of First Amendment rights'") (alterations in original) (quoting *Bolger*, 463 U.S. at 79-80 (Rehnquist, J., concurring).

personal contact by mail, telephone, leafleting, or in-person solicitation, in cease-and-desist zones. See Pet. at 6-7; J.A. 57, 60.

Finally, respondents incorrectly accuse petitioners of arguing that "protecting residential privacy is an insufficient justification for a commercial speech regulation." Opp. at 16. Petitioners expressly acknowledged that residential privacy is a substantial state interest that satisfies that element of the *Central Hudson* test. Pet. at 17. But, as noted above, the State's undoubted interest in protecting residential privacy is distinct from interests normally invoked to support commercial speech regulation (*e.g.*, the prevention of fraud or the preservation of a fair bargaining process). "It is the State's interest in protecting consumers from 'commercial harms' that provides 'the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.' Yet bans that target truthful, non-misleading commercial messages rarely protect consumers from such harms." *44 Liquormart*, 517 U.S. at 502-03 (citation omitted). In such circumstances, "there is far less reason to depart from the rigorous review that the First Amendment generally demands." *Id.* at 501.

The Court should grant the petition to decide the proper standard of review for restrictions on truthful, non-misleading commercial speech not addressed to commercial harms.

B. The Decision Below Conflicts With Decisions Of This Court And Of The Seventh Circuit.

1. Respondents contend that there is no conflict between the decision below and this Court's decision in *Discovery Network* and the Seventh Circuit's decision in *Pearson* v. *Edgar*, 153 F.3d 397 (7th Cir. 1998). They do so by selective quotation that ignores the analytical bases for the decisions.

In *Discovery Network*, this Court struck down a ban on commercial newsracks. The Court held that the city's distinction between commercial and non-commercial

newsracks "bears no relationship whatsoever to the particular interests that the city has asserted," and that, with respect to the asserted "interest in esthetics," the commercial newsracks are "no greater an eyesore than the newsracks permitted to remain on Cincinnati's sidewalks." 507 U.S. at 424, 425. (emphasis omitted). In this context, the Court concluded that:

> absen[t] some basis for distinguishing between "newspapers" and "commercial handbills" that is relevant to an interest asserted by the city, we are unwilling to recognize [the city's] bare assertion that the "low value" of commercial speech is a sufficient justification for its selective and categorical ban on newsracks dispensing "commercial handbills." [*Id.* at 428.]

Thus, the crucial point was that the city's law unconstitutionally discriminated against commercial speech because it was content-based and underinclusive. Commercial content was disfavored despite the fact that the commercial nature of the content had no relationship to the esthetic interests the discrimination purported to serve. The Court prohibited such an underinclusive, content-based restriction on speech because, as it later explained, "States could prevent all newsracks from being placed on public sidewalks, but . . . could not ban only those newsracks that contained certain commercial publications." *44 Liquormart*, 517 U.S. at 512 n.20.

Respondents seek to distinguish *Discovery Network* by asserting that § 442-h(3) is not underinclusive, but that effort fails. Section 442-h(3) distinguishes real estate solicitations from other commercial solicitations, but the State has failed to show that such solicitation is uniquely injurious to residential privacy. Indeed, respondents' assertion that New York had legitimate reasons for distinguishing real estate solicitation from other solicitation simply ignores the contrary factual finding of the district court, see App. 25a (the State has "not made a showing that solicitation by realtors causes greater

harm to homeowners' privacy interests than do other forms of commercial speech that broadcast through like media sources"). Moreover, although respondents repeatedly quote the court of appeals' statement that "'[t]he record adequately demonstrates that the harm to homeowners' privacy from real estate solicitations is real,'" Opp. at 21 (alteration in original) (quoting App. 12a), this reliance on the existence of citizen complaints about real estate solicitation misses the point. A demonstration that real estate solicitation adversely affects privacy is wholly unrelated to the question of its underinclusiveness, which depends entirely upon whether real estate solicitation affects privacy in a manner that other solicitation does not.

Unwelcome real estate solicitation, like all unwelcome solicitation, may invade a homeowner's privacy. But, the lower courts did not and could not find that real estate solicitation threatens or causes any unique harm to residential privacy. No such evidence exists. See also Pet. at 23 & n.9. Thus, just as the law at issue in *Discovery Network* bore no reasonable relationship to the city's stated interest, § 442-h(3)'s restriction on real estate solicitation bears no reasonable relationship to residential privacy. The decision below conflicts with *Discovery Network*.

The analytical foundation of *Discovery Network* was not lost on the Seventh Circuit when it addressed a statute materially indistinguishable from § 442-h(3). That court observed that in *Discovery Network*, the law "was underinclusive – it only attacked part of the problems of safety and esthetics caused by newsracks," and concluded that "underinclusiveness indicate[s] a lack of reasonable fit." *Pearson*, 153 F.3d at 404. The Seventh Circuit held that without evidence that real-estate solicitation uniquely harms residential privacy, "a mechanism whereby homeowners can reject real estate solicitation but not other kinds of solicitation cannot be said to advance the interest in residential privacy 'in a direct and material way.'" *Id.* That is the situation here,

and §442-h(3) would not have withstood constitutional scrutiny in the Seventh Circuit.

Respondents cite distinctions that are wholly irrelevant. For purposes of *Central Hudson*, it makes no difference that the Illinois statute applies statewide, while § 442-h(3) applies only in cease-and-desist zones (*e.g.*, the entire County of Queens). What is determinative is that the States failed to show that real estate solicitation causes unique harm to residential privacy. Both statutes are equally unconstitutional under *Central Hudson* and *Discovery Network*.

The decision below thus conflicts with decisions of this Court and with *Pearson*. This Court should grant the petition to resolve these conflicts.[3]

2. Petitioners agree with respondents that a resident-activated mechanism for implementing restrictions on speech will not save a speech restriction that "is otherwise unconstitutional." Opp. at 22. Section 442-h(3) is not content-neutral, because it applies only to real estate related speakers and messages. Thus, the fact that § 442-h(3) is resident-activated does not immunize its content discrimination and underinclusive coverage from constitutional scrutiny. Cf. *R.A.V.*, 505 U.S. at 388-89 (applying strict scrutiny to content-based regulation of wholly unprotected categories of speech).

That is the rule derived from language in this Court's cases addressing resident-activated mechanisms. See, *e.g.*, *Rowan* v. *United States Post Office Dep't*, 397 U.S. 728, 737 (1970) (approving content-neutral resident-activated mechanism); *Pearson*, 153 F.3d at 404 ("*Rowan* involved no governmental distinction between one kind of offensive material and another – all distinctions were made by the homeowner").

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[3] Respondents do not even attempt to refute petitioners' demonstration that the decision below conflicts with *Carey* v. *Brown*, 447 U.S. 455 (1980), and *Police Department* v. *Mosley*, 408 U.S. 92 (1972). Pet. at 24.

Indeed, respondents concede that if "New York lacked a proper basis for regulating in-home real estate solicitations differently from other types of solicitations, the fact that § 442-h(3) is resident-activated would not alone render it constitutional." Opp. at 22-23. The record is devoid of evidence that real estate solicitations uniquely harm residential privacy, which is what the district court found and the court of appeals implicitly acknowledged.

As set forth in the petition, resident-activated mechanisms are increasingly popular government tools. This effective and popular legislative device, however, may not be used to punish and abridge speech based on its content. The petition should be granted to address the use of resident-activated mechanisms to impose content-based restrictions on disfavored speech.

C. This Case Is An Excellent Vehicle For Resolution Of The Issues Presented.

Respondents' final contention is that the petition should not be granted even if the issues are important and recurring and even if conflicts and uncertainty exist. Respondents point out that the lower courts did not address the State's alternative justification for § 442-h(3) – prevention of blockbusting – and surmise that this Court would therefore be required "to evaluate the anti-blockbusting interest asserted by the State without the aid of analysis by the lower courts." Opp. at 10.

Respondents are wrong. The court of appeals held that § 442-h(3) is constitutional based on the State's substantial interest in protecting residential privacy. App. 10a-11a. Only that judgment and the issues it presents are before this Court.

As described in the petition, it is clear why the lower courts declined to rely on the State's asserted alternative interest in preventing blockbusting. The Second Circuit had already held that "the failure of the Secretary to provide direct and concrete evidence that the evil that the restriction purportedly aims to eliminate does, in fact, exist will doom the

nonsolicitation regulation under *Central Hudson*." *New York State Ass'n of Realtors, Inc.* v. *Shaffer*, 27 F.3d 834, 842 (2d Cir. 1994). (This discussion is not "hypothetical[]," as respondents state, Opp. at 24 n.6; the court of appeals found the evidence of blockbusting insufficient to support the law.) In this case, petitioners showed, as in *Shaffer*, that there was no basis for finding that § 442-h(3)'s restriction on speech could be supported by the State's interest in preventing blockbusting. See Pet. at 9 n.3. The district court eschewed reliance on the blockbusting rationale, while the Second Circuit explicitly stated that its decision was based *solely* on the State's interest in protecting residential privacy.

There are no circumstances under which this Court would be required to rule in the first instance on the State's alleged alternative justification. If the Court were to vacate the court of appeals' decision, it would remand this matter for further proceedings, at which point the lower courts would be free to take up any issues the State has preserved. Unless and until this Court acts, however, the court of appeals' decision – holding that the underinclusive, content-based restriction on truthful, non-misleading commercial speech set forth in § 442-h(3) is neither subject to strict scrutiny nor unconstitutional under *Central Hudson* – stands. That decision, which squarely decides important and recurring questions in a manner that conflicts with decisions of this Court and others, is worthy of this Court's plenary consideration.

CONCLUSION

For the reasons set forth in the petition and in this reply brief, the petition for certiorari should be granted. In the alternative, the petition should be held pending this Court's decision in *Nike, Inc.* v. *Kasky*, 71 U.S.L.W. 3319 (U.S. Jan. 10, 2003) (No. 02-575).

Respectfully submitted,

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